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Alphabetical List of Cases.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 287.

THE CHARLES NELSON COMPANY, APPELLANT

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANT.

Statement of the Case.

The claim here in suit grew out of a so-called contract of February 23, 1917 (Rec., p. 7), for 1,675 M feet (about) of Douglas fir, to be furnished as ordered by the Supply Officer at the Puget Sound Navy Yard during the remainder of the year 1917, and focuses on the stipulation therein that:

> "It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas fir which may be ordered for the naval service at the place named during the period ending December 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas fir contracted for."

The contract provided that:

> "Bidders must state on the blank lines provided under each class the name of the mill and the place from which the material will be shipped. If the material will be supplied from stock and not specially manufactured, the exact location where the finished material is in stock must be stated,"

and,

> "The contractor must furnish the Bureau of Construction and Repair, Navy Department, Washington, D. C., with a certified copy of the order placed with the mill which will supply the lumber. Inspection will not be ordered until this certificate is furnished. This certified copy of order need not include the price, terms, etc., but must include the specifications under which the material is ordered."

Accordingly, upon the execution of the so-called contract, the appellant (located at San Francisco), on one of its usual order forms, directed the Crown Lumber Company, a subsidiary, at Mulkilteo, Washington, to furnish 1,675,000 feet B. M. of Douglas fir, as the same might be ordered from time to time by the Supply Officer at Puget Sound Navy Yard (Finding IV, Rec., pp. 17-18).

Presumably a copy of that order was furnished to the Bureau of Yards and Docks as required by the contract.

And the Supply Officer was notified that A. A. Scott, General Manager of the Crown Lumber Company (who was also General Manager of the Puget Sound Mills and Timber Company at Port Angeles, Washington, another subsidiary), was the authorized representative of the appellant in the matter of furnishing lumber under the contract (Finding IV, Rec., p. 18).

Thereafter the Supply Officer, from time to time, transmitted orders for lumber to the Crown Lumber Company, invoices for which when filled, were signed,

"Charles Nelson Company, by A. A. Scott, its agent" (Finding V, Rec., p. 18).

Upon the declaration of war (April 6, 1917), activity at the Navy Yard was extended, among other things, to the building of submarine chasers, requiring large quantities and unusual sizes of lumber (Finding VIII, Rec., p. 21); and instead of deliveries under the contract being spread out during the contract period (1917), orders aggregating the contract quantity, 1,675,000 feet, were transmitted to the Crown Lumber Company prior to May 21, 1917.

Although the market value of lumber rose materially following the declaration of war, the appellant raised no question as to the unilateral character imposed upon the contract by the stipulation first before quoted, but performed its undertaking to furnish the 1,675,000 feet called for by the contract.

The sudden demand for immediate delivery of the whole amount contracted for taxed the facilities of the appellant's subsidiaries, and labor troubles contributed to delays in deliveries, which were the subject of correspondence in May, 1917 (Finding V, Rec., p. 18).

The Supply Officer and his superiors, however, had undertaken to construe the stipulation referred to as obligating the plaintiff to furnish any quantity, without limit, that might be ordered; and, without notice to the appellant, had proceeded to transmit to the Crown Lumber Company orders in excess of the 1,675,000 feet specified in the contract.

On May 17, the commandant of the Navy Yard wired the plaintiff (Finding V, Rec., p. 18):

> "We are withholding orders approximately 115 M feet rough dimension and 15 M feet finish fir lumber on account congestion Crown Lumber Company mill. Delivery desired by June 1st. Can you arrange to furnish this and

future urgent orders under contract 28942 from other mills until such time situation at Crown Lumber Company is relieved?"

On May 18th the plaintiff wired the commandant to confer with Mr. Scott, General Manager of the Puget Sound Mills & Timber Company, at Port Angeles, Washington, and on the 18th a letter was written from the office of the plaintiff company at San Francisco, quoting the above telegrams and stating (Finding V, Rec., p. 18):

> "Immediately on receipt of your telegram we wired Mr. A. A. Scott, General Manager of the Puget Sound Mills & Timber Company, Port Angeles, to do everything he possibly could to furnish the orders you are withholding, as also other business that he may have on his books for the department. Would be pleased to have you confer direct with Mr. Scott relative this business."

It thus appears that Mr. Scott was then at Port Angeles. Evidently he returned to Mulkilteo on May 21st, and discovered that orders in excess of 1,675,000 feet had been transmitted to the Crown Lumber Company, for on that day he wrote the Supply Officer as follows (Finding V, Rec., pp. 18-19):

> "Dear Sir: By referring to this contract which calls for 1,675 M feet of lumber in sizes or grades as may be required, in amount up to but not to exceed 1,675 M feet, as needed during a period ending December 31, 1917. Up to the present time, including the one scow load which we will deliver today, we have delivered against this contract approximately 950 M. We have orders which you have sent us for delivery of approximately 1,186 M. There is due on this contract only 725 M, so that you will have to recall approximately 461 M of these orders which you have sent us, as we cannot apply

them against this contract, for we cannot exceed the amount of the original contract, viz., 1,675 M feet.

"Would kindly ask you to advise us what proportion of these orders which we now have unfilled on our books that you wish to withdraw."

On May 22nd, the Supply Officer replied, quoting the stipulation first herein quoted, and saying (Finding V, Rec., p. 19):

"Your request, therefore, will not be complied with, inasmuch as the contractor, the Charles Nelson Company, is bound to deliver any quantity of lumber which may be ordered under this contract as per terms mentioned above.

"A copy of this letter is being furnished the contractor, the Charles Nelson Company, 230 California Street, San Francisco, with the request that the situation be relieved by removing from your hands orders covering sufficient lumber to insure prompt delivery under all orders outstanding."

And on May 23, the Supply Officer wired the appellant (Finding V, Rec., p. 19) that the Crown Lumber Company and the Puget Sound Mills and Timber Company had declined to fill orders for approximately 300 M feet and that unless immediate arrangements were made to effect deliveries, it would be necessary to purchase in open market, charging against the appellant's account. It will be observed that the letter and telegram did not disclose that orders in excess of 1,675,000 feet had been sent to the Crown Lumber Company.

Orders No. 6 of June 2, No. 7 of June 5, and No. 8 of June 21, were by Mr. Scott accepted under protest (Finding V, Rec., pp. 19-20).

Some time in the early part of June, Mr. Scott and Mr. H. W. Jackson, Vice-President of the appellant, had a conference at the Puget Sound Navy Yard with

the Chief Clerk, the Supply Officer, and the Naval Constructor stationed there, during which Mr. Scott, speaking for the appellant, reiterated his protest against being required to deliver more than 1,675,000 feet at the contract prices, and the representatives of the Government maintained that the matter was covered by the contract (Finding VI, Rec., p. 21).

This conference occurred prior to June 18, for the letter of that date, incorporated in Finding V (Rec., p. 20), refers to Jackson's having been on the Sound "recently," and evidently prior to the communication from the Supply Officer under date of June 14, referred to therein, wherein the plaintiff was informed that the Supply Officer had been instructed by the Navy Department, that, if the contractor failed to make delivery, purchase in the open market was authorized.

The court below refused to incorporate in its findings the communication of June 14 (set out in full in the petition, par. 11, Rec., p. 4), thereby violating the rule of evidence that where a letter is admitted to letter to which it was a reply should also be admitted.

The communication of June 14 was evidently written after the conference at the Navy Yard, for the purpose of making a further record of the position taken by the Government's representatives, but was so phrased as not to carry any suggestion that it had reference to orders in excess of the 1,675,000 feet called for by the contract.

The parties thus definitely established their attitudes, the appellant maintaining that it was not obligated to furnish in excess of the 1,675,000 feet called for by the contract, and the Government officials insisting that the contract obligated the appellant to furnish any amount, without limit, that might be ordered, and threatening, in case of refusal or failure, to purchase in

the open market and charge the excess cost to the appellant and its sureties.

In this situation, faced with the alternative of being branded as a failing contractor, and having reserved its rights by protests, the appellant thereafter, on demand of the Government's representatives, furnished in excess of the 1,675,000 feet called for by the contract, lumber to the amount of 2,013,259 feet, the value of which, at market prices was, in the aggregate, $18,310.21 in excess of the prices specified in the contract. The Government, adhering to the contention of its representatives, allowed therefor only the contract prices (Finding VII, Rec., p. 21).

The appellant bases its claim for recovery of the market price of the excess lumber furnished, upon the grounds that the amount which it undertook to furnish was limited to 1,675,000 feet, and that the contract was void for want of mutuality; and, in any event, that, as appears from Finding VIII (Rec., p. 21), much of the 1,675,000 feet and the excess (2,013,259 feet) furnished, was ordered for use, and used, in the construction of submarine chasers. There is no finding that any portion of such excess was used for any other purpose.

This type of vessel had never been built at the Puget Sound Navy Yard or elsewhere at the time the contract was executed, and the furnishing of lumber for such use was not within the contemplation of the parties at the time of the execution of the contract, and the coercion of the appellant into furnishing lumber for such new and unforseen purposes in such extraordinary quantity was unconscionable.

The majority of the court below (Booth, J., dissenting) failing to appreciate the manifest injustice of requiring the appellant to furnish 3,688,259 feet of lumber under a contract for "about" 1,675,000 feet (even if such contract had been mutually binding), in their opinion

(Rec., p. 22) first held that the contract was mutually binding as one for such quantities of lumber "as might be needed," in the absence of any suggestion in the contract that "need" was to be the measure of mutual obligation and in the face of the stipulation which was that the contractor should furnish any quantities "which may be *ordered* for the naval service" but "the Government not being obligated to order any specific quantity"; and that the appellant, suing for the value of the excess lumber which it had been coerced into furnishing, was estopped from questioning the mutuality of the contract, because it had furnished the 1,675,000 feet called for by the contract.

The majority of the court below, thus holding that the contract was mutually binding and that the measure of the obligation of both parties was "the needs of the Navy Yard during the stated period," in the face of the plain specification of "1,675 M feet B. M. (about)" as the subject matter of the contract, then held that the appellant was obligated, irrespective of previous conditions and character of "the needs at the yard" to furnish any (unlimited—from zero to infinity) quantity that might be ordered for the entirely new and extraordinary needs of war preparations. The majority of the court below then, apparently as support for their ruling, advanced the astonishing proposition that the plaintiff did not attempt to show that at the time that it entered into the contract and submitted its bid it did not understand that it was so obligated under the contract.

It is then suggested by the majority of the court below that it is open to reasonable inference "from the facts found" that the appellant recognized its obligation under the contract to supply the needs of the Navy Yard even if not legally obligated by the contract. But the appellant showed its understanding of the limit of its undertaking when it issued its order to the Crown Lum-

ber Company to furnish, as ordered, only 1,675,000 feet, a certified copy of which order was, by the contract, required to be filed with the Bureau of Yards and Docks, and presumably was so filed and accepted without objection. If it is important, as the court below seems to think, to know what construction the appellant placed on the contract, it is here clearly shown that it believed it was obligated to furnish but 1,675,000 feet as ordered.

Curiously it is then said that Mr. Scott, the agent of the appellant, undertook to limit the liability of the appellant under the contract to the furnishing of 1,675,000 feet, but that, according to his own testimony, he did not then know of the stipulation in the contract first herein quoted.

He needed only to know that the subject-matter of the contract was 1,675,000 feet. But it appears that the stipulation in the contract was quoted in the Supply Officer's letter to him of May 22d, in response to Mr. Scott's protest of May 21st, yet, notwithstanding, Mr. Scott continued to protest by letter and did so personally at the conference at the Navy Yard early in June.

The majority of the court below then say it fairly appears that Mr. Scott's position in the matter was contrary to that of his principal, and entirely out of line with instructions given him. On the contrary, Mr. Jackson, Vice-President of the appellant, was present at the conference early in June, when Mr. Scott protested as spokesman for the appellant.

There is presented the legal paradox of finding that Mr. Scott was the authorized agent of the plaintiff, whose acts were its acts, and yet finding that his position, which was, therefore, the position of his principal, was contrary to the position of his principal.

The instructions given Mr. Scott were explicit, to furnish 1,675 M feet as ordered.

The majority of the court below, seeking to sub-

stantiate their assertion that Mr. Scott's position was entirely out of line with the instructions given him, then undertake to eliminate the order to furnish 1,675 M feet given by appellant to Mr. Scott, by suggesting that it was an order by the appellant to one of its subsidiaries, that the United States was in no sense a party thereto, and that the liability of the appellant under its contract could not be limited thereby.

Of course, the liability of the appellant could not be limited by the order given by it to its subsidiary, but it showed its construction of the contract by its instructions to Mr. Scott as "the authorized representative of the plaintiff company in the matter of the furnishing of lumber under its contract" (Finding IV, Rec., p. 18), and issued in compliance with the provisions of the contract, *supra*, which required that a certified copy of such order be furnished the Bureau of Construction and Repair.

If any presumption may be indulged, it is, in the absence of anything to the contrary, that such copy was duly furnished and accepted by the Government's representatives as complying with the contract. If the Government's representatives had not at that time understood that the contract was for 1,675,000 feet only, the copy of the order, limited to that amount, would not have been accepted; inspection authorized and deliveries accepted. American Ry. Express Co. *vs.* Lindenburg, U. S. S. C., Jan. 8, 1923, and cases cited.

The majority of the court below, after noticing that by the letter of May 21st, Mr. Scott first undertook to limit the liability of the appellant to 1,675,000 feet, then assert that deliveries made and *accepted orders* then on hand exceeded that amount.

In Finding V (Rec., p. 18), the majority of the court below found that by May 21st the Crown Lumber Company had delivered approximately 950,000 feet, and

received and accepted orders in addition thereto for the delivery of 1,186,000 feet, or 461,000 in excess of 1,675,000 feet.

We feel that we are justified in protesting against the manifestly unfair and unfounded finding of fact that the Crown Lumber Company, before May 21st, had *accepted* orders for lumber in excess of 1,675 M feet, and to disclose to this court upon what that finding was based. We quote from our motion for new trial and modification of findings of fact:

> "The witness Scott testified (Rec., p. 19, Q. 39 and 40) that they never at any time consented to agree to furnish any lumber over and above the 1,675,000 feet at the price named in the contract and (Rec., p. 27, Cross-Question 127) he merely answered the inquiry as to orders in excess of 1,675,000 feet having been given and added, 'but not delivered.' The only reference in the record to the subject of acceptance of orders is in the statement of Hoopes, commencing at page 73 (in the record by stipulation), wherein at page 76 appears the following:
>
> 'Q. You may state whether or not formal acceptance of orders were usual under contracts of this kind?
>
> A. Formal acceptances were not usually received from the contractors.
>
> Q. Now, you may state, if you can, from an records, or correspondence which you may have, whether or not any amounts of lumber in excess of 1,675,000 feet had been ordered before the letter of the Crown Lumber Company, of May 21, 1917?
>
> A. An examination of the records show that prior to May 21, orders in excess of the quantity covered by the contract had been placed *and accepted by the contractor. In support of this statement attention is invited to first indorsement signed by myself*, dated May 14, 1919, file C-28942, on Bureau Supplies and Accounts letter of 2d of May, 1919, No. 28942 PD.'

"It will be observed that the support for the statement of Hoopes that orders in excess of the quantity covered by the contract had been placed and *accepted* by the contractor, is the indorsement of May 14, 1919, accompanying his statement and appearing in the Record at page 78, as follows:

'It was not customary for the contractor or the sub-contractor to furnish any formal acceptance of the different orders placed, and the acceptance of these orders was considered automatic by this office upon their issuance in accordance with the terms of the contract. In view of this fact and the further fact that the last order previous to May 21st was dated May 16th, also the statement in enclosure (e) that the contractor had on hand at that date orders for a quantity in excess of that specified in the contract, it is considered that the protest filed in letter of May 21st, was filed after the acceptance of the orders; subsequent orders, however, were accepted under protest, as will be noted from enclosures (h), (m), (r), and (s).' "

Aside from this, the Crown Lumber Company and Mr. Scott, as agents of the plaintiff, were without authority to accept, on behalf of the plaintiff, orders in excess of 1,675,000 feet. And, as suggested before, when Mr. Scott discovered that in his absence orders in excess of 1,675,000 feet had been received by the Crown Lumber Company, he wrote the letter of protest of May 21, *supra*.

And it may be suggested that the finding that orders in excess of 1,675,000 feet had been accepted, is a conclusion of law from undisclosed fact.

The majority of the court below, after speculating as to Mr. Scott's mental state, then assert that while he was attempting to limit the appellant's liability, the appellant itself, although informed of his attitude, made

no such contention, but on June 18 wrote the letter set out in Finding V (Rec., pp. 20-21) which, they seemed to think, clearly repudiated Mr. Scott's position.

As noted before, the majority of the court below refused to incorporate in its findings the letter of June 14 to which the letter of June 18 was a reply. In the letter of June 14 there was nothing to indicate that delivery in excess of the contract amount of 1,675,000 feet was referred to. And the reply of June 18, written from the appellant's office in San Francisco, contains nothing to indicate that the writer (the finding does not disclose by whom or by what authority that letter was written) was referring to orders or deliveries in excess of 1,675,000 feet, but the contrary. It is therein said that:

> "It has never been our intention or aim to fail to make delivery of your requirements *as we may be committed to under the contract above quoted.*"

Under the contract, aside from its lack of mutuality, the plaintiff was committed to delivery of only 1,675 M feet.

In the next paragraph it is said:

> "Nothing is left undone in order to produce the lumber that you have ordered *under the contract.*"

And the final sentence reads:

> "We are not asking to be relieved of any responsibility, but rather we submit the facts with a view of enlisting your cooperation to assist us in completing our *engagements.*"

There is nothing to indicate that the writer was even aware that orders in excess of the 1,675,000 feet had been transmitted to the Crown Lumber Company, and certainly he did not evidence by the language used, any idea of extension of the liability of the contractor

beyond the terms of the contract, yet the majority of the court below read that letter as a concession by the appellant that it was obligated by the contract to furnish any quantity of lumber without limit that might be ordered.

The majority of the court below then concluded:

> "If the plaintiff's obligation under its contract was in fact to furnish 1,675,000 feet of lumber and no more, it would have been entirely within its rights, having furnished that amount, to refuse to furnish more. And having furnished additional quantities in compliance with orders specifically predicated on the contract, it can not while complying with such orders create or preserve by so-called protest a right to additional compensation over and above the contract price. We have so held in the recent case of Willard, Sutherland & Co. *vs.* United States, decided November 7, 1921."

The ruling in the Willard, Sutherland & Company case (now pending in this court as No. 209, this term), has been overruled by the decision of this court in the case of Freund & Roemmich *vs.* United States (Nos., 29 and 37), November 13, 1922.

ARGUMENT.

The plaintiff is entitled to recover upon three grounds:

1. Because the so-called contract was void for want of mutuality.

2. Even if the contract was legal and binding the said excess lumber was used for the building of submarine chasers, an entirely new type of vessel that had never been constructed at the Puget Sound Navy Yard or elsewhere. Consequently the use of the lumber for such purpose could not have been in contemplation of the parties at the time of the execution of the contract.

3. The action of the Government in compelling by threats the appellant to deliver approximately three times as much lumber as the Government specified, when there had been a great increase in the market price of such lumber, was unconscionable and against public policy and the plaintiff is entitled to recover for said excess lumber so furnished on a *quantum meruit.*

I.

CONTRACT VOID

The contract entered into by the appellant and the Government was void for want of mutuality, and the appellant could terminate it upon notice at any time. The Government rested its entire case upon the proposition that the following provision in the contract was valid and binding:

> "It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas fir which may be ordered for the naval service at the place named during the period ending December 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas fir contracted for."

It was under this provision that the officers of the Government contended that the plaintiff was obligated to deliver any amount of Douglas fir lumber that might be demanded for use at the navy yard during the period covered by the contract (Rec., 19, p. 21, Finding VI).

The Court of Claims in the opinion stated:

> "The plaintiff first contends that this clause is void for want of mutuality in that the United States was not obligated. Such a contention is not tenable. The purpose of the contract was to procure such lumber during a given period as *might be needed,* at a place where lumber had

> always been needed and where, so far as human foresight could know, lumber would be needed during the period covered by the contract. The plaintiff, with former experience under such contracts, sought by its bid *the right* to supply such needs, its *contract secured to it such rights* and they were enforceable thereunder." (Italics ours).

The court below says that it was "the purpose of the contract to procure such lumber during a given period as might be needed" at the yard but the contract contains no such provision. By construction the Court of Claims clearly interpolates in the contract the provision, "*needs of* the *yard.*" The Government did not agree to take what "*might be needed*" but only "*what may be ordered.*" While some lumber might be needed, there was no obligation on the part of the Government to purchase that amount, as it agreed only to purchase what "may be ordered," *expressly denying obligation* to *order any*. The opinion of the Court of Claims says that the contract secured to the plaintiff "the right to supply such needs" but such provision is not to be found in the contract itself. The only right the plaintiff secured was to furnish such lumber as "may be ordered," which is no right at all, for the Government might not order any. We submit that if the provision of the contract quoted is not void, for want of mutuality, then so far as the books show, human ingenuity and human blundering have not yet produced one that was.

The representatives of the Government, in their zeal to protect it, made the measure of the Government's liability not "*the needs of the yard*" but such quantity as the Government "*might order,*" and then to preclude any possibility of misunderstanding as to the liability of the Government added these words: "*the Government not being obligated to order any specific quantity of Douglas fir contracted for.*"

It is perfectly manifest that the Government exhausted its ingenuity in trying to write a contract that would bind the contractor but not the Government.

The fact that the Government based its entire defense on the validity of the provision of the contract above quoted and that the Court of Claims based its adverse decision on such validity, is the justification for presuming to argue a strictly elementary proposition of law and cite authorities thereon.

> "And unless both parties are bound so that an action can be maintained by either against the other for a breach, neither will be bound. This proposition is absolutely axiomatic, not admitting of being overthrown by authorities, so long as the law requires something of value as a consideration, for when it is admitted that there is nothing for A's promise to rest on but B's promise, if B has not promised, A's promise rests on nothing and is void." (Bishop on Contracts, Enlarged Edition, Paragraph 78.)

What could the Government have done or failed to do that would have given the contractor a right of action against it for breach of the contract under the provision quoted? What was the Government obligated to do under that provision?

The intention of this so-called contract is perfectly apparent. It was an attempt on behalf of the Government to *bind the contractor* and leave the *Government free* to do whatever it thought was to its advantage. The Government attempted by this contract to place itself in a position where it could buy in the open market if the *price fell* and could compel the contractors to *furnish all* the lumber it desired if the *price increased.* No court of last resort in this country has ever sustained a contract containing such provision. The following citations are directly in point:

> "But an accepted promise to furnish goods, merchandise or other property, at certain prices,

during a limited time, in such quantities as the accepter shall require, or want in his business, is without consideration and void, because the accepter is not bound thereby to require or take any articles whatever under the supposed agreement." (Cold Blast Transportation Co., 114 Fed., 77-80.)

"The defendant was not bound to order, to receive, or to pay for any of the articles named in the offer; and there was therefore no consideration for the offer itself, and no mutuality in the supposed agreement." (Ibid. 82.)

"But an accepted offer to sell or deliver articles at specified prices during a limited time in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity is without consideration and void, because the acceptor is not bound to want, desire or take any of the articles mentioned." (Ibid. 81.)

"Accepted orders for goods under such void contracts constitute sales of the goods thus ordered at the prices named in the contracts, but they do not validate the agreements as to articles which one refuses to sell or deliver, under the void contracts, because neither party is bound to take or deliver any amount or quantity of these articles thereunder." (Ibid. 81.)

"Should the contract under discussion be upheld, the plaintiff in error would be held to occupy this advantageous situation: If the prices of dock oak lumber rose, they would, by that much, increase their ratio of profits, and probably, coming into a situation to out bid competitors, increase also the quantum of orders; if, on the other hand, prices fall below the range of profits, the orders could be wholly discontinued."

"On the contrary, the situation of the defendant in error would be this: Should prices fall, it could not compel the plaintiffs in error to give further orders; but should prices rise, the orders

sent in would be compulsory, and the loss measured, both by the increase of the ratio of profits, and the probable increase of the quantum of orders. It is needless to say that such a contract is unilateral, and void for want of mutuality. It in effect binds the defendant in error alone, for it leaves the plaintiff in error—whose whole interest is embodied in the prices obtainable—in a situation to either go on or to discontinue, as such interest develops." (Crane *vs.* Crane & Co., 105 Fed., 869, 872.)

"And we can discover no way, by the terms of the contract, whereby the defendant could put the plaintiffs in default for failure to order more oil each week, because *the amount* and *times* of *ordering* are left wholly to the *plaintiffs*. If the market price of oil should fall below the contract price, then, according to their contention as to the terms of the contract, the plaintiffs could purchase their supply of oil elsewhere, and at the lower price, resorting to the contract, when, and only when, the price stated was lower than the market price—and this without respect to time. Such a contract is one-sided and without mutuality." (American Cotton Oil Co. *vs.* Kirk, 68 Fed., 791, 793.)

"But, on plaintiffs' own theory, it is manifest that the agreement is a *nudum pactum*. We scan its provisions in vain to find the imposition, on Campbell, of any obligation to *take* or *pay* for *any* amount of the coal whatever. He undertakes nothing except to pay, at the end of each month, for such coal as he *may* have *chosen* t- *order*. (Campbell *vs.* Lambert, 36 La., 37.)

"In the case at bar the defendant confessedly was not obliged to take from the plaintiff, under the contract, all the stone required to complete his contract with the city, but only 'such quantities as he might desire.'" (Hoffman *vs.* Maffali, 104 Wis., 637.)

"Upon the foregoing statements of facts the engagement of plaintiffs was to purchase all of said pig-iron which they *might want* in their

said business during the time specified; but they do not engage to want any quantity whatever. They do not even engage to continue their business. If they see fit to discontinue it on the very day on which the supposed agreement is entered into, they are at liberty to do so at their own option, and, whatever might have been defendant's expectation, he is without remedy. In other words, there is no absolute engagement on plaintiff's part to 'want' and of course no absolute engagement to purchase any iron of defendant." (Held void.) (Bailey *vs.* Austrian, 19 Minn., 535; Gil., 465, 468.)

"A contract 'to furnish, sell and deliver, to defendant all of the boot and shoe parts which defendant should *require* of *them* in his business aforesaid for the 'season' ensuing next after said agreement, which said 'season,' as all parties hereto then and there well knew, began in 1871 prior to December and ended about January 15, 1872; that they agreed to furnish, sell and deliver such articles, from time to time throughout such 'season' in such quantities and at such times as the said defendant should 'require and request' at certain named prices, which defendant on his part promised to pay." (Held contract was void.) (Tarbox *vs.* Gotzian, 20 Minn., 140. Gil., 122.)

The Court of Claims, in their opinion, referred to the case of Willard, Sutherland & Company *vs.* the United States, recently decided by it. (56 C. C., 413.) That case is now in this court on appeal. That case is also based upon a contract with the Navy Department and the form of contract used by the department is apparently the same as used in the case at bar.

The provision in dispute is *identical* except that in the Willard, Sutherland case the contract says "*coal specified which may be needed*" while in the case at bar those words are stricken out and the words "*Douglas fir which may be ordered,*" inserted.

The contract in the Willard case was signed some months prior to the contract in this case. It therefore conclusively appears that the Government in this case changed the form of contract that had been formerly used as in the Willard case. They changed the obligation of the contract from the "*needs of the yard*" to "*quantities ordered.*" The Court of Claims in this case, by interpretation, seeks to strike out the words inserted by the parties in the contract and to restore the words stricken out by them.

The court below, having by this new method reformed the contract so as to give it a meaning those who made it did not intend, then held that it was not void for want of mutuality.

II.

Excess Lumber Not Covered by Contract. The Purpose For Which the Lumber Above the Estimated Amount of 1,675,000 Feet Was Used Was Not Within the Terms of the Contract And Was Not Within the Contemplation of the Parties At the Time of the Execution of the Contract.

Even if the contract had been binding and valid the plaintiff would have been entitled to recover the market price for the lumber furnished over and above the specified amount, because much of the entire amount of lumber furnished, probably an amount much greater than the excess above the specified amount, was used in the construction of submarine chasers, a new type of boat never before constructed at this yard or elsewhere (Rec., p. 21, Finding VIII).

It is true that the Court of Claims finds only that this type of vessel had not been constructed at this yard, but this court knows judicially that none at the time of the execution of the contract had ever been constructed

anywhere. This type of vessel was invented after that time. In the language of a naval officer, "it was an unforeseen development of the war." At the time of the signing of the contract it was in "the womb of the future." When the contract was signed, it was made and accepted by both parties with reference to the ordinary requirements of the yard as ordinarily conducted. By the construction of submarine chasers, an entirely new business, the amount of lumber used at the yard was approximately three times as great as it had ever been before, and approximately three times as great as either party estimated it would be at the time the contract was signed.

> "The proposition made and accepted was made with reference to 'the requirements of that well-established business.' Plaintiffs were not proposing to make castings beyond the current requirements of that business and would not have been obligated to supply castings not required in the usual course of that business." (Lima Locomotive & Machine Co. *vs.* National Steel Castings Co., 155 Fed., 77.)

The Government contends that the parties intended to contract in reference to something that at the time the contract was made *never had been*, and insofar as human intelligence could know, *never would be*.

> "No matter how broad or how general the terms of the contract may be, it will extend only to those matters with reference to which the parties intended to contract." (Corpus Juris., Vol. 13, 523.)

This court, in Utah, N. & C. Stage Co. *vs.* U. S., 199, U. S., 414, in passing upon this question, used the following language:

> "There must be some limit to the service which can be required without additional compensation, under the authority vested in the Postmaster General by the contract, to call for

> new or additional service of the same character. Otherwise it is within the power of the Government to ruin a contractor by new and wholly unanticipated demands, which caution and prudence, however great, could not have foreseen. If this were a contract between individuals, a claim of the right to require this vast amount of additional work—evidently not within the contemplation of the parties—without additional compensation would hardly be seriously entertained. The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the Government and individuals."

In the case at bar the contention of the Government is more inequitable and more unjust, and incomparably more unconscionable than the one in which this court used the language above quoted. In this case, owing to the war, prices greatly increased, yet the Government not only demanded and received, below the market price, the full amount of 1,675,000 feet, which both parties agreed was all that would be required for all purposes at the yard, but by threats to buy in the open market and charge to the account of the contractor and to proceed against the contractor's bond, the Government coerced the contractor to furnish 2,013,259 feet additional for the construction of a new type of vessel—for work of a character that had never before been done at that or any other naval yard—and allowed therefor the contract prices, approximately $10 per M below the market prices.

At the time of the decision of the Court of Claims in the case at bar, the case of Freund et al. *vs.* United States, *supra*, had not been decided by this court. That case would seem to be conclusive of the case at bar. The learned Chief Justice there disposes of the contention of the Government and the ruling of the Court of Claims

that the work demanded from the contractor by the Government came within the provisions of the contract, in the following plain and forcible statement of the law:

> "It is, of course, wise and necessary that Government agents in binding their principal in contracts for construction or service should make provision for alterations in the plans, or changes in the service, within the four corners of the contract, and thus avoid the presentation of unreasonable claims for extras. This court has recognized that necessity and enforced various provisions to which it has given rise. But sometimes such contract provisions have been interpreted and enforced by executive officials as if they enabled those officers to remould the contract at will. The temptation of the bureau to adopt such clauses arises out of the fact that they avoid the necessity of labor, foresight and care in definitely drafting the contract, and reserve power in the bureau. This does not make for justice, it promotes the possibility of official favoritism as between contractors and results in enlarged expenditures, because it increases the prices which contractors, in view of the added risk, incorporate in their bids for Government contracts. These considerations, especially the first, have made this court properly attentive to any language or phrase of these enlarging provisions which may be properly held to limit their application to what should be regarded as having *been fairly* and *reasonably* within the *contemplation of the parties* when *the contract was entered into*." (Italics ours.)

How can it be contended with *any pretense of sincerity* that in the case at bar the *furnishing* of *lumber* for the *construction* of *submarine chasers* "should be regarded as having been *fairly* and *reasonably* within the *contemplation* of the *parties* when the *contract* was *entered into*"? In the language quoted from the above-cited case, the ruling of the Court of Claims here that the furnishing of

the excess of lumber demanded was within the terms of the contract, "does not make for justice—it promotes the possibility of official favoritism as between contractors and results in enlarged expenditures, because it increases the price which contractors, in view of the added risk, incorporate in their bids for Government contracts."

Under the interpretation of the contract given by the Court of Claims, the representatives of the Government could favor or penalize the contractor at will. Such construction upon Government contracts of this character increases the cost of public work and opens wide the door to favoritism and fraud. In the case at bar, if the contractor had been financially weak, the Government would have destroyed it by this iniquitous interpretation.

III.

The Contract Was For 1,675,000 Feet Only.

By threats and coercion the Government compelled the plaintiff to deliver approximately three times the amount of lumber named by the parties in the making of the contract, and this excess was of a much higher grade and more valuable than the lumber that had generally been used at the yard before. The plaintiff had furnished lumber for the use of the yard under previous contracts, so both parties knew well what were the ordinary requirements of the ordinary business of the yard. If the contract is valid—which we deny—then a fair and reasonable reading of it demonstrates clearly that the plaintiff was to deliver only 1,675,000 feet (about) and no more. It is nowhere stated in the contract that the plaintiff shall deliver such quantities as are needed at the yard. What the contract states is "that the contractor shall furnish and deliver any quantities of

Douglas fir which may be ordered," and then in the next sentence says:

> "Fir, Douglas, as follows:
>
> 1. 1,675,000 feet b. m. (about) of such sizes or grades as may be ordered—per M feet.)" (Rec., p. 8.)

Nowhere else is there a statement, estimate, or guess as to the amount of lumber that the plaintiff would be required to furnish. We submit that the statement in the contract was definite and specific; that the plaintiff under any circumstances, was not to furnish in excess of about 1,675,000 feet. It is not necessary to cite authorities to show that the term "about" thus used in a contract means approximately the sum specified. We submit that if the question of want of mutuality in the contract is waived, and the fact that the excess lumber was used for a new and unforeseen purpose that was not in contemplation of the parties at the time the contract was signed, even then it would be a harsh and unwarranted interpretation of the contract to say that the contractor was obligated to deliver approximately three times the amount specified in the contract, and that the parties so intended when the contract was signed, *If the Government agreed to do anything whatever under the terms of the contract it was not to order more than 1,675,000 feet.* The court will not put such harsh interpretation upon the contract as did the Court of Claims.

> "The words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one, and the court will likewise endeavor to give a construction most equitable to the parties, and which will not give one of them an unfair or unreasonable advantage over the other." (13 Corpus Juris., p. 540.)

This court, in the case of Freund et al. *vs.* U. S., *supra*, in discussing a provision in a Government contract

somewhat similar to the one under consideration, and speaking of the construction placed thereon by the Government, declared that such construction did not make for justice and that it promoted the possibility of official favoritism as between contractors, and then said:

> "These considerations, especially the first, have made this court properly attentive to any language or phrase of these enlarging provisions which may be properly held to limit their application to what should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into."

IV.

The Contractor Acted Under Duress.

In the case of Freund et al. *vs.* U. S., *supra*, the court said:

> "We cannot ignore the suggestion of duress there was in the situation or the questionable fairness of the conduct of the Government, aside from the illegality of the construction of the contract insisted on."

The court will not overlook the duress under which the contractor acted in this case, nor forget that the action of the contractor in complying with the Government's demands did not in any way injure the Government, but favored it. The Government threatened to buy the lumber it was demanding in the market and charge the difference between the market price and the price named in the contract against the plaintiff. This, as the record shows, would have amounted to over $18,000. The Government, further, threatened suit upon the bond and under the terms of the bond, the contractor, if liable, could have been penalized in any sum not to exceed 10

per cent of the purchase price of the lumber for failure to make prompt deliveries.

Again this court will take judicial knowledge of the practice of the Navy Department in regard to contractors listed by the department as having defaulted. The credit, reputation, and financial standing of the contractor would have been greatly damaged if it had refused to comply with the demands of the Government, no difference if it had afterwards established that it was acting entirely within its legal rights.

But greater than any of these things enumerated, and greater than all of them taken together, this court judicially knows that at the time the Government was making these demands upon the contractor the country was at war, that the lumber demanded was to be used for urgent needs of war—used in the construction of a newly invented vessel to destroy the infamous submarines that were not only murdering our soldiers and destroying our commerce, but were threatening the destruction of civilization. It was a time of excitement and great public feeling, and if the contractor had refused at this time to comply as promptly as possible with the demands of the Government, it faced the unspeakable odium of being charged with lack of patriotism, and of being accused of being a profiteer and a slacker. Under such circumstances to say that by complying with the demands of the Government the plaintiff waived any legal right it might have, is a proposition so unjust that no language is too harsh to characterize it.

V.

Erroneous Rule of Law Declared in the Opinion of the Court of Claims.

The Court of Claims in its opinion, uses this language:

> "But whether the contract obligated the plaintiff to the extent of the needs of the navy yard or only to the extent of 1,675,000 feet of lumber,

> the undisputed facts are that the defendant's representatives construed plaintiff's obligation as measured by the needs, irrespective of the estimated quantity stated, of which the plaintiff was fully informed, all orders were placed with direct reference to and under this contract, and the orders, except as withdrawn, were filled. If the plaintiff's obligation under its contract was in fact to furnish 1,675,000 feet of lumber and no more, it would have been entirely within its rights, having furnished that amount, to refuse to furnish more. And having furnished additional quantities in compliance with orders specifically predicated on the contract, it can not while complying with such orders create or preserve by so-called protest a right to additional compensation over and above the contract price. We have so held in the recent case of Willard, Sutherland & Co. *vs.* United States, decided November 7, 1921."

We submit that the language above quoted holds that even if the contract was void for want of mutuality, and if the excess of lumber was used for a new and different purpose not in the contemplation of the parties at the time the contract was signed, and if, under the specific terms of the contract the plaintiff was obligated to deliver only 1,675,000 feet, still, notwithstanding all these conditions, if the appellant did deliver the lumber it would have no right to recover the market price for the excess so delivered, no matter what threats the Government may have used or what protests may have been made by the contractor. In other words, we think that the Court of Claims squarely holds that if there is a dispute between the Government and a contractor as to the amount of material due under a contract, the contractor placing one construction upon it and the Government another, and the contractor, under threats and coercion, delivers more than the

amount that he was obligated to deliver under the contract, still under such circumstances the contractor cannot recover the market price for the excess so delivered if he has accepted as partial payment the price mentioned in the contract.

In other words, the Court of Claims holds that where there is a dispute between the Government and the contractor as to the construction of the contract, the contractor must, at his peril, refuse to accept the Government's construction and refuse under any circumstances to comply with the demands of the Government, or he waives all legal right to redress. Under this view of the law the court below consistently held that appellant's protests availed nothing. Such cannot be the law, nor would it be to the advantage of the Government to have it so. How is the Government injured by having the contractor deliver the material demanded upon the terms insisted upon by the Government, the contractor reserving the right after it is so delivered, to appeal to the courts to decide which party was correct in its interpretation of the contract?

The attitude of the Court of Claims on this point is directly and squarely in conflict with the decision in the case of Eugene Freund et al. *vs.* U. S., *supra*. That case is conclusive of the case at bar on every point except the want of mutuality in the contract, a point that did not arise in the Freund case. It is not conceivable that the Court of Claims would have made the decision it did in the case at bar if at the time it was rendered it had had before it the decision in the Freund case.

Respectfully submitted,

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